United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5024

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-5024

HARVEY R. MILLER, as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,

Plaintiff-Appellant,

against

NEW YORK PRODUCE EXCHANGE, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (CARTER, *J.*)

BRIEF FOR DEFENDANTS-APPELLEES WALTER C. KLEIN AND BUNGE CORPORATION

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JOAN M. WEISSMAN, a legal assistant, participated in the preparation of this Brief.

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Preliminary Statement

This brief is submitted on behalf of defendants—appellees Walter C. Klein and Bunge Corporation ("Bunge") and will be devoted to issues relating to Bunge and Klein (Points I and II, *infra*) and to the "ex-pit" transactions (Point III, *infra*). Other issues relating generally to all defendants-appellees are dealt with in the joint brief sub-

mitted on behalf of all defendants-appellees ("Joint Brief").

Klein is, and was during the relevant period, president of Bunge and is sued in this action on the theory that he allegedly breached duties as a member of the Board of Managers and of the Executive Committee of the Board of Managers of the New York Produce Exchange ("Produce Exchange" or "Exchange"). Bunge is an exporter, principally of grains, and to a lesser extent of other commodities, and is sued as Klein's employer solely on the theory of vicarious liability.

Issues Presented

1. Did the Trial Court err in directing a verdict at the close of plaintiff's case as to the allegations of bad faith on the part of Bunge and Klein? (pp. 6-9, *infra.*)

2. Did the Trial Court abuse its discretion by excluding evidence relating to the Harbor Tank incident on the ground that the inordinate delay, confusion of the jury and undue prejudice which would have been created thereby outweighed the probative value, if any, of that evidence and on the further ground that its introduction would have constituted a relitigation of a complicated matter on which plaintiff had already had his day in court? (pp. 9-25, *infra.*)

Background Facts*

Structure of the New York Produce Exchange

In 1963, the management of the Produce Exchange was comprised of a 15 member Board of Managers, including three officers of the Exchange, which was responsible for setting overall policy, a Managing Director, who was re-

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* A more complete statement of the facts, including an identification of the individuals and companies involved in this case, appears in the Joint Brief.

sponsible for the active supervision of the day-to-day operations and approximately 20 full-time employees performing the daily functions of the Exchange. (Berg, JA 725a-727a; MacDonald, JA 488a-489a, 507a, 629a, 632a-633a; Klein, JA 1374a.)

In addition to the Board, the Managing Director and the employees, the Exchange had a number of committees made up from among the Exchange members and responsible for the supervision of various segments of the Exchange's activities. These committees in turn reported to the Board of Managers. (Berg, JA 685a-694a, 700a-701a; Klein, JA 1423a-1424a.)

While the Managing Director and his staff were employed by the Exchange on a full-time basis, were compensated by the Exchange, and were responsible for its day-to-day operations, it was the function of the Board of Managers to establish overall policy for the Exchange and to provide overall supervision of its activities.* (MacDonald, JA 632a-633a; Klein, JA 1374a, 1423a-1424a.)

Members of the Board and its Executive Committee were uncompensated (NYPE By-Laws Secs. 12, 17(c), PX 55, JA 259e) and, without exception, were employed full-time in other occupations. (*e.g.*, Fashena, JA 895a; Vogel, JA 1479a; Klein, JA 1371a-1372a; MacDonald, JA 486a; Anderson, JA 1170a.) As a policy-making body, the Board relied upon the committee structure of the Exchange as well as the Managing Director and other full-time employees of the Exchange to keep it abreast of those activities on the Exchange which required the attention of the Board of Managers. (Berg, JA 700a-701a; Klein, JA 1423a-1424a.)

Pursuant to the by-laws, nominees to the Board of Managers were apportioned among the different trade

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* Although the Board designated an Executive Committee, it was not the policy of Donald MacDonald, President of the Exchange, nor his predecessor, to use the Executive Committee; rather, they presented matters to the entire Board. (MacDonald, JA 509a.)

interests represented in the total membership of the Exchange, including the grain trade, the shipping trade and the pepper and oils trades.* (NYPE By-Laws Sec. 7, PX 55, JA 259e; MacDonald, JA 629a-630a.)

Because Klein's expertise was in the grain trade, coupled with the fact that he was with a company whose business was principally grain, he was elected to the Board to fill one of the positions allocated for the grain trade. (Klein, JA 1375a-1377a, 1425a; MacDonald, JA 669a.)

Walter C. Klein

In his brief, plaintiff labels all individual defendants, including Klein, as "trader-regulators".** *E.g., Appellant's Brief at 16.* The fact is that Walter Klein was not a futures trader in any commodity, either during 1963 or at any other time. (Klein, JA 1417a.) In 1963, Klein was, and he continues to be, the President of Bunge Corporation, a company with annual sales in excess of $1 billion. (Klein, JA 1371a-1372a, 1421a.)

Bunge employed approximately 1,200 persons during 1963. Only 40 of those employees, less than 4% of Bunge's total number of employees, were employed in the Oil Department, the Bunge department that dealt with Allied. That department accounted for only 10% to 15% of Bunge's total business. (Klein, JA 1376a, 1418a.)

Notwithstanding the size of the other business operations over which Klein had ultimate responsibility, plaintiff

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* Consideration was also given to the members of the Exchange operating small businesses and a position of the Board of Managers was ear-marked for that interest as well. (Fashena, JA 896a-897a.)

** When it serves plaintiff's purpose, he readily discards the "trader-regulator" label. In the section of his brief dealing with corporate defendants, plaintiff relies on the fact that Klein, Anderson, and Vogel were *not* traders on the Produce Exchange. Appellant's Brief at 97.

suggests that Klein directly ran Bunge's Oil Department and therefore had intimate knowledge of Bunge's day-to-day dealings with Allied. Appellant's Brief at 25-27. However, the evidence is uncontradicted that Klein did not participate in the day-to-day management of that department.* (Klein, JA 1402a, 1422a.) That responsibility was in the hands of two vice presidents, Harry Fornari and Richard Forti, who headed the department and were in charge of its operation. (Klein, JA 1402a; Fornari, JA 1282a.) Fornari and Forti reported to Klein who established overall policy for that department as well as every other Bunge department. (Klein, JA 1376a-1378a, 1420a-1421a; Fornari, JA 1286a-1289a.)

Klein testified that during 1963 he was unaware of any concern regarding the cottonseed oil futures market until the afternoon of November 13, 1963 when Anderson came to his office to discuss what Anderson had learned about the size of DeAngelis'** position on the Exchange. (Klein, JA 1389a-1391a, 1421a.) Klein and Anderson then went to see Carl Berg, Managing Director of the Exchange, who called a special meeting of the Board of Managers. (Klein, JA 1393a-1394a.)

On Thursday, November 14, Klein attended and participated in the special meeting of the Board of Managers which appointed a Control Committee to examine this matter. (Klein, JA 1395a-1401a.) In the morning of Sun-

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* In fact, the undisputed evidence demonstrates that during 1963 Klein was principally engaged in two major enterprises: the expansion of Bunge's grain storage and delivery network in the midwestern United States and the negotiations for grain sales to the Soviet Union which were taking place throughout the fall of 1963. (Klein, JA 1376a, 1420a-1421a.) Klein's records show that he was absent from Bunge's corporate offices for 150 days during 1963 and he so testified at trial. (Klein, JA 1420a.)

** The names "DeAngelis" and 'Allied" are used interchangeably herein to include Allied Crude Vegetable Oil and other entities through which Anthony DeAngelis dealt in vegetable oils.

day, November 17, Klein left New York for a long planned business trip to Argentina. Although that trip was scheduled to last two weeks, Klein returned to New York on the evening of November 20, after having been informed by cable that Allied had filed a petition in bankruptcy. (Klein, JA 1399a, 1407a-1408a.) By that time the decision to close the Exchange had been made. At trial Klein testified that he ratified that decision and characterized the decision as a courageous action. (Klein, JA 1410a.)

At the end of plaintiff's case, the judge directed a verdict in favor of Klein as to the bad faith issue (JA 1794a, 1795a), and at the end of the trial, the jury rendered a general verdict in favor of Klein. (JA 2131a-2132a.)

ARGUMENT

POINT I

The Trial Court Did Not Err in Directing a Verdict as to Bad Faith at the Close of Plaintiff's Case

Plaintiff contends that Klein acted in bad faith in that he allegedly schemed to keep the cottonseed oil market open from November 14 through November 19 in order for Bunge to profit by making short sales. In the first place, even if that had been Klein's intention, he was only one of 15 members of the Board. In the second place, the decision on November 14 to appoint a control committee was proper and was not based on any conspiracy or bad faith motive. As pointed out by the Trial Judge (JA 1794a), plaintiff simply did not elicit any evidence of conspiracy, combination or bad faith.

Plaintiff's contention as to a bad faith motive on the part of Klein is clearly refuted by the undisputed evidence that as a result of the market remaining open, Bunge suffered millions of dollars in losses on long contracts which it held

as broker for Allied* (Fornari, JA 1335a), which amount far exceeded profits from short sales during that period.

Between the close of business on November 14 and November 19, 1963, Bunge sold a total of 253 cottonseed oil futures contracts on the New York Produce Exchange. (Fornari, JA 1302a-1304a.) Plaintiff argues here, as he did at trial, that Bunge profited by over $400,000 from these futures transactions and further suggests that Bunge's transactions in soybean oil futures during this period produced a profit of over $2,000,000. Appellant's Brief at 40-41. He contends that Bunge profited because the Exchange remained open and that it must have known that the market would decline. The evidence demonstrates the fallacy of this proposition.

Bunge was acting as broker for Allied for 1,000 long cottonseed oil futures contracts. (Fornari, JA 1310a; Klein, JA 1393a; DeAngelis, JA 1122a.) Significantly, Bunge had taken over these contracts from Haupt on November 13, as a result of a Rule 6A ex-pit transaction. (Fornari, JA 1310a, Tr. 3499.) Had Bunge known on November 13 that Allied was on the verge of bankruptcy it obviously would not have taken the contracts. Had Bunge known on November 14 that the market would decline sharply and that Allied would be unable to meet margin calls on those 1,000 long contracts, it clearly would have been in Bunge's interest for the Exchange to close on November 14 or as soon thereafter as possible.

After November 14, Allied failed to pay variation margin calls well in excess of $1,250,000 on the 1,000 cottonseed oil contracts Bunge held for it on the New York Pro-

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* In this action, Bunge sought to recover its losses in the amount of $3,616,882.00 as a counterclaim. By stipulation of the parties that counterclaim was to operate as an offset to any recovery against Bunge and so was mooted by the directed verdict in favor of Bunge.

duce Exchange. (Fornari, JA 1311a; PX 156, JA 567e.)* In order to make so-called profits which at most, even by plaintiff's calculations, total $412,490, Bunge would hardly expose itself to losses of well over $1,250,000 which it actually suffered as broker for Allied on the New York Produce Exchange.

Although the Trial Court correctly excluded evidence as to Bunge's trading on the Chicago Board of Trade in soybean oil futures, plaintiff's suggestion that Bunge reaped huge profits there during this period, Appellant's Brief at 53-54, is clearly refuted by the fact that on the Chicago Board of Trade, Bunge acted as broker for Allied and held 2500 long contracts on that market. (Fornari, JA 1309a-1310a; Klein, JA 1393a; DeAngelis, JA 1122a.) Thus, had plaintiff been allowed to introduce evidence of Bunge's trading on that market, Bunge would have again been able to prove that its losses far exceeded any so-called profits.

There is no evidence from which to draw an inference that Klein or Bunge knew that the market should be closed but failed to act in order to secure profits. In fact, the evidence allows only one conclusion, that had Klein or Bunge had any confidential information about Allied to use to Bunge's advantage, they would have begun liquidating the 1,000 contracts on the Produce Exchange as well as the 2,500 contracts on the Chicago Board of Trade as soon as Allied failed to meet the November 15 margin calls. They would also have sought to close the market on November 14. Plaintiff himself unwittingly conceded the truth of this statement at trial.**

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* The amount of variation margin paid can be calculated by reference to PX 156, JA 567e, and is at least $1,368,000, using the futures month with the least decline from November 15 through November 19.

** Thus, in Plaintiff's Memorandum in Opposition to the Defendants' Motion for a Directed Verdict, plaintiff stated that ". . . by refusing to close the market [on and after November 14, 1963] . . ." the appellees acted " . . . to the detriment of the longs including the *brokers* clearing contracts for the longs. . . ." (JA 2337a, 2432a) (emphasis added).

Because Bunge could be held liable only by imputation through Klein's bad faith, the absence of a finding that Klein acted in bad faith foreclosed that issue as to Bunge. Therefore a directed verdict that Bunge and Klein did not act in bad faith was entirely proper.

POINT II

The Trial Court Did Not Abuse its Discretion in Excluding Evidence Concerning the Harbor Tank Incident

At trial, plaintiff attempted to inject evidence of a sharply disputed incident which took place in September, 1962 and which had been the subject of a prior lawsuit. The evidence was excluded.

That incident (the "Harbor Tank incident") involved the provocative story of DeAngelis and his henchmen using a gun and an alleged bribe in the course of trying to dissuade a Bunge-hired independent surveyor from inspecting two vegetable oil storage tanks.* Five of the persons, including Klein, present at a meeting with DeAngelis shortly after the incident occurred, have testified in other proceedings that DeAngelis convinced them that the tanks were empty because of a mixup and that the oil was in other tanks at Allied's facilities. It is plaintiff's contention that DeAngelis would have testified at trial that he told Klein and the other persons present at that meeting that that oil and other large quantities of oil did not exist. Appellant's Brief at 55.

Although at the time that plaintiff commenced this action, almost a decade ago, he and his counsel were aware

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* The events, both as the Bunge officials have related them in prior testimony and as plaintiff claimed they happened, are set forth in the Appendix to the Memorandum in Support of Motion by Defendants Bunge Corporation and Walter C. Klein With Respect to Certain Evidence. (JA 2239a, 2264a-2289a.)

of the allegations involved in the Harbor Tank incident, he chose to wait for two years and then commenced a separate suit based entirely on those allegations against Bunge & Klein in state court in New Jersey (the "Harbor Tank action").

Plaintiff's position with respect to the relationship between the Harbor Tank action and this action has taken at least two 180° turns. When he obtained leave from the Bankruptcy Court to commence the Harbor Tank action, plaintiff represented that his claims arising out of the Harbor Tank incident were "entirely separate and distinct" from his claims here. (See p. 19, *infra.*) By the time the Harbor Tank action was ready for trial, however, plaintiff was contending that that action involved, at least in substantial part, the claim that Klein had breached duties as a member of the Board of Managers of the Produce Exchange and that issue was argued extensively in plaintiff's trial brief in the Harbor Tank action. (See p. 21, *infra.*) Now, after having settled and dismissed the Harbor Tank action with prejudice, plaintiff takes the position that the claims in the Harbor Tank action had nothing to do with the claims here. Appellant's Brief at 56. Despite his present position, however, in explaining the relevance of the Harbor Tank incident in this action, plaintiff asserted before the Trial Court precisely the same arguments *verbatim* that he used in his trial brief in the Harbor Tank action. (See pp. 21-22, *infra.*)

Not only did plaintiff have his day in court as to the Harbor Tank incident, but he seeks to gloss over the complicated nature of the factual issues involved. Plaintiff sets forth, as if it were fact, but one of two versions of the Harbor Tank incident which DeAngelis has told since 1963. Appellant's Brief at 25-26, 55. Both of DeAngelis' versions have consistently been flatly denied by all Bunge officials who were involved, including Walter Klein. Had DeAngelis, a confessed swindler, been allowed to relate this

story at trial, Bunge and Klein would have been forced to refute it through extensive testimony by Bunge officials, by lengthy deposition testimony of one of the Bunge officials who has since died, by protracted cross-examination of DeAngelis, and by documentary and other analysis of the transactions in order to demonstrate the logical flaws in his story.

In the context of the seven week trial of this case, the Trial Court exercised its discretion not to have a "trial within a trial" and excluded evidence as to the Harbor Tank incident, stating the grounds in part as follows (the entire opinion is reproduced in the Appendix hereto, *infra*):

> "I must confess that perhaps a more careful framing of the issues in New Jersey might have led to the results which plaintiff asserts here. But as I read the issues and as they are presented, they do not conform to the restricted reading that plaintiff asserts. Even if I were disposed to allow it and concede at that time plaintiff was correct on that first ground, I would bar it under any circumstances [because] I think that it would be prejudicial, it would lead to confusion, and would probably prolong the trial.
>
> It would cause, it seems to me, a trial within a trial; it would make the Court's task of keeping the trial focused on the basic issues, which is as I think you all understand, in a multi-party trial, it is difficult at best, in my judgment it would make a task impossible." (JA 1011a-1012a.)

Plaintiff asserts that evidence of the Harbor Tank incident was relevant for purposes of impeaching Klein's credibility and for showing Klein's and Bunge's knowledge of Allied's financial instability. Appellant's Brief at 55-56. He seeks to avoid the application of the principles against relitigation by arguing that the law of *res judicata* does not

prevent him from bringing several actions, using the same evidence and arguments in each action. Appellant's Brief at 56.

If the Trial Court concluded that either of plaintiff's arguments was insufficient, exclusion of the evidence was proper. In fact, the Trial Court concluded that neither argument was sufficient and we will demonstrate below that the Court was correct in this determination.

A. The Relevance, If Any, Of The Proffered Evidence Is Outweighed By Its Propensity To Confuse The Jury And Unduly Delay The Trial.

1. *Rule 403 Of The Federal Rules Of Evidence Affords The Trial Judge Broad Discretion In Admitting Or Excluding Evidence.* The Federal Rules of Evidence grant the district court broad discretion in determining whether to exclude proffered evidence.* Rule 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Pursuant to this provision, evidence of unquestionable relevance may be excluded to avoid risks of unfair prejudice, confusion, undue delay or the introduction of cumulative evidence. The Advisory Committee observed in its Notes explaining the Rule:

> "The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a

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* The proper standard to be applied by this Court in reviewing the Trial Court's evidentiary ruling is an abuse of discretion standard. *United States* v. *Bowe*, 360 F.2d 1, 15-16 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966). *See also Belmont Industries, Inc.* v. *Bethlehem Steel Corp.*, 512 F.2d 434, 439 (3d Cir. 1975); *Estate of Le Baron* v. *Rohm and Haas Co.*, 506 F.2d 1261, 1263 (9th Cir. 1974).

purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission."

Rule 403 merely codifies previous case law which recognized the large discretionary role of the trial judge in controlling the introduction of evidence. *Belmont Industries, Inc.* v. *Bethlehem Steel Corp.*, 62 F.R.D. 697 (E.D. Pa. 1974), *aff'd*, 512 F.2d 434 (3d Cir. 1975); 1 *Weinstein's Evidence* ¶ 403[01], citing *Construction Limited* v. *Brooks-Skinner Bldg. Co.*, 488 F.2d 427 (3d Cir. 1973).

These principles were applied by this Court in *United States* v. *Bowe*, 360 F.2d 1 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966). In that case, a criminal defendant offered evidence relevant to the defense of entrapment and to impeach the chief government witness. The trial court excluded the evidence on grounds now codified in Rule 403, and the jury returned a verdict of guilty. On appeal, this Court affirmed the trial court's discretionary exclusion of "admittedly relevant evidence". 360 F.2d at 15. As this Court declared:

> "A trial judge has discretion to exclude evidence which is only slightly probative if its introduction would confuse and mislead the jury by focusing its attention on collateral issues and if it would unnecessarily delay the trial. [citations omitted] The rationale underlying this broad grant of discretion is that such a determination necessarily requires the balancing of intangible factors peculiarly within the knowledge of the trial judge." *Id.*

The Court considered in *Bowe* the effect the proffered evidence would have had on the trial, stating:

> "[I]t is apparent, as the trial judge stated after hearing extensive argument, that the introduction of

> the proffered testimony would have opened up a trial within a trial. It would not only have been proper to call witnesses to the alleged conversation . . . but other witnesses might have been called for impeachment purposes. [citations omitted] The trial judge correctly concluded that the confusion and delay which would have resulted from the introduction of Tehan's testimony outweighed its slight probative value." *Id.* at 16.

A recent case similarly on point applying these principles to exclude evidence is *Belmont Industries, Inc.* v. *Bethlehem Steel Corp.*, 62 F.R.D. 697 (E.D. Pa. 1974), *aff'd*, 512 F.2d 434 (3d Cir. 1975). In that case, an antitrust action, the trial lasted approximately two weeks (as opposed to the seven weeks here) and plaintiff sought to introduce certain evidence as to the termination of its credit by defendant. The Court excluded that evidence and declared:

> "In determining admissibility, the Court must balance the possible relevancy or probative value of offered evidence against the traditional countervailing factors referred to above, namely the danger of unfair prejudice, confusion of issues, or misleading the jury, or considerations of undue delay, waste of time and needless presentation of cumulative evidence. *In striking this balance the Court determined that the scale was tipped against admission and that the questionable probative value was outweighed by the possibility of prejudice, confusion and undue delay.*" *Id.* at 707 (emphasis added).

On appeal, the Court of Appeals for the Third Circuit upheld exclusion of this evidence and held as follows:

> "The decision whether the risk of unreasonably prolonging the trial or prejudicing or distracting the jury justifies exclusion of proferred evidence is committed to the discretion of the district court.

> The trial judge here did not abuse his discretion in excluding evidence of the alleged credit termination. . . . Whatever relevance the alleged credit termination has to the principal issues for trial, resolving the question whether Bethlehem did plan to cut off Belmont's credit and if so its motivation in doing so, would have consumed considerable trial time. Moreover, there was a risk that the presentation of conflicting testimony on this collateral matter might obscure the central issue in the minds of the jury and confuse the jury with unrelated facts. The excluded evidence also might have provoked a decision by the jury on an emotional basis rather than on a rational consideration of all the evidence in the case." *Belmont Industries, Inc.* v. *Bethlehem Steel Corp.*, 512 F.2d 434, 439 (3d Cir. 1975) (footnotes omitted).

2. *The Proffered Evidence Would Have Prolonged The Trial And Created An Additional Risk Of Jury Confusion In An Already Complex Case.* The excluded evidence which the plaintiff sought to offer concerning the Harbor Tank incident, by his own admission, ". . . presents numerous unresolved issues of law and fact . . . [and] the defenses interposed by Bunge and Klein have been and will continue to be vigorously presented." (Seligson Application for Approval of the Settlement of the Harbor Tank Action, ¶ 20, JA 2249a.) Notwithstanding this representation to the Bankruptcy Court, plaintiff now presents that matter before this Court as if it were a simple undisputed fact.

Contrary to what the plaintiff would have this Court believe, introduction in this case of the full array of evidence relating to the Harbor Tank incident, including Bunge's and Klein's defenses thereto, would have created a "trial within a trial" and an undue delay of this proceed-

ing.* In addition, the presentation of conflicting testimony on this collateral question would have obscured the central issues in this case.

Confusion and undue delay are sufficient justification for a trial court, exercising discretion, to exclude evidence. *United States* v. *Bowe*, 360 F.2d 1, 16 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966). The risk of confusing the issues and misleading the jury especially compels the exclusion of evidence when its introduction will require detailed rebuttal evidence. *See Estate of Le Baron* v. *Rohm and Haas Co.*, 506 F.2d 1261, 1263 (9th Cir. 1974); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962).

Judge Weinstein summarizes this matter in his treatise as follows:

> "Courts are also reluctant to admit evidence which is seemingly plausible, persuasive, conclusive and significant if detailed rebuttal evidence or complicated judicial instructions would be required. . . ." 1 *Weinstein's Evidence* ¶ 403[04] at 403-25 (1975).

Beyond these considerations, the inflammatory nature of the evidence, namely, allegations of bribery and threats with a gun, which would inevitably capture the attention of the jury, had the clear potential to divert the attention of the jury from the real issues in the case. Courts have consistently stated that evidence likely to be prejudicial because of its inflammatory nature should be viewed with extreme caution. *See, e.g., International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); *Frank* v.

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* The events, both as the Bunge officials have related them in prior testimony and as plaintiff claimed they happened, are set forth in the Appendix to the Memorandum in Support of Motion by Defendants Bunge Corporation and Walter C. Klein With Respect to Certain Evidence. (JA 2239a, 2264a-2289a.)

United States, 262 F.2d 695, 697 (D.C. Cir. 1958); *Loew's Inc.* v. *Cole*, 185 F.2d 641, 661 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951).

As illustrated by the description of the Harbor Tank dispute, all of the risks which Section 403 was designed to avoid were inherent in the evidence relating to the Harbor Tank incident.

3. *The Proffered Evidence Had Little, If Any, Probative Value.* When balanced against the undue risk of prejudice, the probative value of this evidence falls far short of the weight required to substantiate its admissibility. To counter the force of prejudicial effect, in an effort to support the admissibility of the evidence, plaintiff first contends that it is relevant for purposes of impeaching Klein's credibility. Appellant's Brief at 55. That contention does little to substantiate the plaintiff's position. Extrinsic evidence offered solely to impeach would be inadmissible under the collateral evidence rule. Fed. Rules Evid. Rule 608. Further, as the Advisory Committee recognized, evidence offered for impeachment purposes is subject to "the overriding protection of Rule 403." Advisory Committee Notes, Rule 608. Indeed, evidence offered for purposes of impeachment should weigh little in the process of balancing probative value against prejudicial effect.

As a further effort to attach some probative value to the Harbor Tank incident, plaintiff argues that the evidence would show Klein's and Bunge's knowledge of Allied's financial instability. Appellant's Brief at 55. Even if the evidence were relevant to this question, that characteristic alone would not require its admission. What the plaintiff overlooks is that Rule 403 assumes the relevance of the proffered evidence but still mandates its exclusion if such relevance is insufficient to counter-balance the potential for prejudicial effect. *United States* v. *Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966); *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315

F.2d 449, 459 (1st Cir.), *cert. denied,* 375 U.S. 820 (1963); Fed. Rules Evid. Rule 403.

In terms of the probative value, if any, of the Harbor Tank evidence as a means of establishing Bunge's and Klein's knowledge, that evidence would have been cumulative at best, which in itself decreases its probative value. The cumulative nature of the evidence is best illustrated by reference to plaintiff's brief in which he argues that there is already a gigantic amount of evidence of that knowledge.* Even if there were no other considerations and the delay were minor, this evidence could have been excluded solely on the grounds that it is cumulative. *United States* v. *Bowe,* 360 F.2d 1, 16 (2d Cir.), *cert. denied,* 385 U.S. 961 (1966).

Finally, plaintiff's arguments as to the probative value of this evidence must be viewed against the background of the representations which plaintiff made in seeking leave to commence the Harbor Tank action.

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* Thus, plaintiff asserts on pages 49-50 of his brief that he "established":

> "[T]he knowledge on the part of Bunge, Continental and Merrill Lynch of DeAngelis's actual operations and lack of financial stability, from which the jury could easily have concluded that there was additional knowledge of the manipulation and threat to orderly marketing on the part of the trader-regulators representing those companies—Klein, Vogel and Anderson, pp. 22-28, *supra.*"

As authority for the proposition that he had already "established" that knowledge, plaintiff cites the following portions of the record:

> "E.g., Tr. 2127-28, 2768-74, 2776-81, 2785-90, 2830-31, 2871, 2883-88, 3048-49, 3080-3106, 3109, 3195-98, 3212-13, 3245-48, 3358-60, 3364-65, 3371, 3375-76, 3419-23, 3429, 3437-38, 3451, 3555-56, 3559-61, 3617-19, 3621-23, 3625, 3628, 3631-33, 3645, 3646-48, 3654-55, 3717-19, 3724, 3726, 3732, 3761-64, 3779, 3783-84, 3788-94, 3799-3804, 3806, 3808-10, 3818-20, 3822-24, 3830, 3834, 3864, 4022-24, 4106-09, 4410-21, 4565-80, Pl. Exs. 73, 76, 92a-d, 95, 98, 141, 142, 166, 230, 252, 255a-d, 260a-f."

At the time he applied to commence the Harbor Tank action plaintiff conceded that it was:

> ". . . based upon claims *entirely separate and distinct* from the claims asserted in behalf of applicant [Seligson] in the action pending in the United States District Court for the Southern District of New York entitled *Seligson* v. *New York Produce Exchange, et al.*, 66 Civ. 1016, in which action Bunge Corporation and Walter C. Klein are named defendants." (Trustee's Application for authority to commence an action, dated June 28, 1968, at 6, JA 2243a) (emphasis added).

This concession by the plaintiff places him in an unusually weak position to contend now that the evidence excluded by the Trial Court was of such relevance to this proceeding that its probative value outweighed its potential for prejudicial effect, delay and confusion.

On any reasonable balance, the tenuous connection between the Harbor Tank incident and the issues in this action is far outweighed by the risks inherent in that evidence for confusing the jury and for needlessly prolonging an already complicated trial which, as it was, required nearly seven weeks to complete.

B. Admission Of Evidence Concerning Harbor Tank Would Have Violated Principles Of Res Judicata.

In addition to the factors traditionally considered in the application of the principles underlying Rule 403, a separate substantial basis existed for excluding this evidence. The events which make up the Harbor Tank incident formed the sole basis upon which the plaintiff's Harbor Tank action was predicated. Although the present litigation was pending at the time plaintiff commenced the Harbor Tank action, plaintiff nevertheless brought that action in the state courts of New Jersey. The action was subsequently terminated

with prejudice after settlement. The stipulation of settlement reads as follows:

> "Bunge shall pay to the [plaintiff], the sum of $750,000 in full and complete settlement, discharge and satisfaction of Bunge and Klein of and from any and all claims or causes of action asserted by him against Bunge and Klein in the Harbor Tank action." (JA 2231a, 2232a.)

Additionally, the plaintiff executed a general release which states, in part:

> "[Plaintiff], for himself, his predecessors, successors and assigns, and for and on behalf of the bankrupt Estate of Ira Haupt & Co., does hereby remise, release and discharge Bunge and its present and former subsidiaries, affiliates, officers, agents, employees, directors, and stockholders, and Klein, his heirs and executors, from any and all claims asserted by him in the Harbor Tank action." (JA 2236a, 2236a-2237a.)

For the settlement of and the release from the claims asserted by plaintiff in the Harbor Tank action, Bunge and Klein paid the plaintiff the sum of $750,000.

Success by the plaintiff in his attempt to introduce evidence relating to Harbor Tank in this case and to repeat the arguments presented to the New Jersey court would have led to a relitigation of the issues resolved in that court in violation of the fundamental principles underlying the rule of *res judicata.*

Well established public policy mandates that legal controversies once resolved must come to an end. *Reed* v. *Allen,* 286 U.S. 191, 198-99 (1932); *Baltimore Steamship Co.* v. *Phillips,* 274 U.S. 316, 320 (1927). This policy of finality forecloses attempts to relitigate matters which could or might have been presented in the previously resolved proceedings, as well as issues or legal theories directly complained of in the prior litigation. *See, e.g., Commissioner* v. *Sunnen,* 333 U.S. 591, 597 (1948); *Angel* v.

Bullington, 330 U.S. 183, 192-93 (1947); *Heiser* v. *Woodruff*, 327 U.S. 726, 735 (1946); *Buchanan* v. *General Motors Corp.*, 158 F.2d 728, 730 (2d Cir. 1947).

These principles apply with full force to the Trial Court's exclusion of the Harbor Tank evidence. The plaintiff manifestly put in issue in the Harbor Tank action the question of whether the Harbor Tank incident impacted on Klein's duties as a member of the Board of Managers of the New York Produce Exchange. Thus, the plaintiff argued this issue in his trial brief in the New Jersey court, Plaintiff's Trial Brief in the Harbor Tank action at 35-38, including the following:

> "Klein, . . . as a member of the Board of Managers of the New York Produce Exchange, had a duty to disclose his knowledge of Allied's activities to that exchange. It is evident that if Klein had informed the New York Produce Exchange ('N.Y.P.E.'), it too would have carried out its duties and investigated Allied and DeAngelis. As a manager on the N.Y.P.E. Board of Managers ('Board'), Klein owed a fiduciary duty of honesty, good faith and diligence to the N.Y.P.E. and its members, one of which was Haupt. His failure to disclose information vital to the Board's function and purpose was a breach of that duty." Plaintiff's Trial Brief in the Harbor Tank Action at 35. (JA 2174a, 2210a.)

Plaintiff found this language so persuasive that he copied it verbatim in the brief submitted to the Trial Court in this action in order to explain the relevance of the Harbor Tank incident to the present action.* *Compare* Plaintiff's Brief in the Harbor Tank action at 35-38 (JA 2210a-2213a) *with* plaintiff's Memorandum in Opposition to the Motion by Defendants Bunge Corporation and Walter C. Klein With Respect to Certain Evidence at 9-13 (JA 2300a-2304a).

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* In addition, the New Jersey pre-trial order indicated that the alleged dereliction of the duties imposed on Klein by his membership on the Produce Exchange was fully at issue in the Harbor Tank action.

It is hard to imagine more convincing proof that the plaintiff was attempting to make the same arguments and claims in both cases.

By his own words and arguments, the plaintiff has clearly sought to hold Bunge and Klein liable in this action for a violation of the same duty which he alleged that they violated in the Harbor Tank action. As a matter of New Jersey law,* the dismissal of the Harbor Tank action with prejudice operates as a full adjudication on the merits. *Kelleher* v. *Lozzi,* 7 N.J. 17, 80 A.2d 196 (1951). This adjudication triggers the application of *res judicata* principles to any attempt to relitigate the issues thereby resolved. *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 327 (1955); *Mars* v. *McDougal,* 40 F.2d 247, 249 (10th Cir.), *cert. denied,* 282 U.S. 850 (1930). Similarly, the release, which plaintiff also seeks to circumvent, prevents the relitigation of this claim. *Siegel* v. *National Periodical Publications, Inc.,* 364 F. Supp. 1032 (S.D.N.Y. 1973), *aff'd,* 508 F.2d 909 (2d Cir. 1974); *Hyman* v. *McLendon,* 140 F.2d 76 (4th Cir. 1944).

The Trial Court applied these principles in its ruling that evidence relating to the Harbor Tank incident was inadmissible. (JA 1010a-1013a.) By precluding the introduction of that evidence, the Trial Court correctly prevented the relitigation of those issues. *See, e.g., Commissioner* v. *Sunnen,* 333 U.S. 591, 597 (1948); *Koblitz* v. *Baltimore & Ohio R.R.,* 164 F. Supp. 367, 371-72 (S.D.N.Y. 1958), *aff'd,* 266 F.2d 320 (2d Cir.), *cert. denied,* 361 U.S. 830 (1959).

Plaintiff argues that evidence of one set of facts is admissible to support more than one claim. Appellant's Brief at 56. This argument simply misses the point. Not only was the plaintiff seeking to assert the same factual contentions raised in New Jersey, he was also reasserting the same arguments. It is the relitigation of claims that

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* The law of the forum issuing the judgment controls the effect to be given that judgment for *res judicata* purposes. *Fauntleroy* v. *Lum,* 210 U.S. 230, 236 (1908).

the doctrine of *res judicata* prevents. It becomes no less of a bar when an adjudicated claim is attempted to be relitigated in a multi-party, multi-claim action.

Plaintiff cites only two cases as authority for his proposition that the Harbor Tank action should have been relitigated here, *Household Goods Carriers' Bureau* v. *Terrell,* 417 F.2d 47 (5th Cir. 1969), *reh. en banc,* 452 F.2d 152 (5th Cir. 1971), and *Woodbury* v. *Porter,* 158 F.2d 194 (8th Cir. 1946).

In *Terrell,* the parties had settled a prior libel action, premised solely upon an allegedly libelous letter. That letter was offered as evidence in a subsequent antitrust action. The District Court allowed the evidence to be admitted. A three-judge panel ordered a new trial because, although relevant, the letter created a relitigation of the libel action thereby prejudicing rights accrued by the settlement of that action. 417 F.2d at 51.

The Court *en banc* reinstated the liability determination but reversed and remanded on the issue of damages because of the probable effects of the letter. It disagreed with the panel "only as to the scope of the prejudice growing out of the mishandling [of the allegedly libelous letter]." 452 F.2d at 158 n. 13. Three dissenters disagreed with the failure by the *en banc* majority to recognize prejudice on the liability issue as well. 452 F.2d at 162.

All members of the *Terrell* Court expressed grave concern about the prejudicial effect created by the introduction of one exhibit, a libelous letter, that had been the subject of prior litigation. The majority *en banc* concluded that that evidence had prejudiced the defendant only on the damage issue and not on the liability issue. A strong dissent agreed with the opinion of the original three-judge panel to the effect that the introduction of that evidence required reversal as to liability as well as to damages. 452 F.2d at 161-63.

Further, the majority *en banc* stated that there was ample evidence of liability over and above the libelous letter, whose admissibility was challenged, *Id.* at 160, and

undoubtedly its reluctance to require a new trial on liability was based on the conclusiveness of the evidence even apart from the disputed letter.

The other case relied upon by plaintiff, *Woodbury* v. *Porter,* is a 1946 decision of the Eighth Circuit Court of Appeals in which the Court held that a prior injunction action did not bar a subsequent suit for damages, an issue which raises esoteric questions involving the former division between the law and equity sides of the courts. This is an issue as to which there is a sharp division of authority. The better view, espoused by the New York courts, is that a prior injunction action does bar a subsequent action for damages. *Maflo Holding Corp.* v. *S. J. Blume, Inc.,* 308 N.Y. 570 (1955). In any event, that is not the issue in this case.

Indeed, as stated in the Harvard Law Review's *Developments in the Law—Res Judicata,* the modern policy is to minimize unnecessary burdens on courts and litigants and to encourage plaintiffs, whenever possible, to join all of their claims in one action and not to manipulate litigation so that consolidation of claims is impossible:

> "The modern tendency has been to require the consolidation into one action of what could formerly have been spread out over several. Thus, considerations of judicial efficiency have been allowed to outweigh the hardship to the litigant who loses a meritorious claim because he failed to present it in the previous action. Formerly, pursuing one theory, a plaintiff could appear in court on one writ and then, if he lost, sue out another writ and be heard on another theory. . . . Such a system allowed counsel leisure to explore the various possible theories of recovery, but it was abolished in the end because of the insupportable delay and inconvenience in getting a judgment that would finally settle the controversy."
>
> * * *
>
> "Besides putting the other party to the expense of a second trial, and both him and his witnesses to that

> inconvenience, multiple actions waste the time of the courts, particularly where intelligent evaluation of the background of the cases requires covering the same ground gone over before. There is obviously a limit to what can more effectively be tried in one action than in two, but the wiser decisions recognize the convenience of a single action when a substantial part of the facts to be proved under each claim is the same. . . .'' 65 Harv. L. Rev. 818, 826-27 (1952).

In any event, it is within the scope of the discretion accorded the Trial Court in making evidentiary rulings to weigh the prejudicial effect of a relitigation. Judge Weinstein has concluded in his recent exhaustive treatise on the Federal Rules of Evidence that Rule 403 applies with full force to the circumstances raised by this issue:

> ''Courts are reluctant to becloud the issues in the case at trial by admitting evidence relating to previous litigation involving the parties.'' 1 *Weinstein's Evidence* ¶ 403 [04] at 403-24 (1975).

Thus, even assuming *arguendo* the relevance of the Harbor Tank incident to the matter in question, the Trial Court correctly utilized its discretion in excluding evidence of the Harbor Tank incident.

POINT III

The Ex-Pit Transactions* Were Legitimate

Plaintiff's broadside attack on the Trial Judge seems to proceed from the tacit assumption that the trial evidence against defendants was so strong that the adverse jury verdict can be explained only by plaintiff's charges that the Trial Court ''surgically dismembered'' plaintiff's case by

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* As used herein, ex-pit transactions refer to transactions pursuant to Rule 6 of the Cottonseed Oil Futures Contracts Rules (PX 56, JA 303e), characterized in the Rule as "ex-ring trades."

erroneously instructing the jury and otherwise. These charges are of course outlandish. Much of plaintiff's brief is devoted to the ex-pit transactions, the details of which and expert opinions concerning which plaintiff presented at length and argued to the jury at length. A proper analysis of those transactions will demonstrate that there was nothing in plaintiff's case to surgically dismember. The trial record will demonstrate that the Trial Judge leaned over backwards and gave plaintiff enormous leeway in putting in his case.

Plaintiff argues that the ex-pit transactions were illegal and further that DeAngelis' purpose in entering into them was to hold cottonseed oil off the market for as long a period as possible. Plaintiff argues from the facts concerning these transactions that defendants either knew or should have deduced that that was DeAngelis' purpose, and then should have inferred that DeAngelis was over-extended and should have foreseen the debacle. Appellant's Brief at 22-25, 27. For purposes of these arguments, plaintiff ignores the fact that Haupt participated in more ex-pits involving Allied than all the defendants put together (Gray, JA 1748a-1749a, 1758a) and, if the debacle should have been foreseen by someone, that someone was Haupt.

In any event, we will demonstrate below that the ex-pits were not illegal and that neither defendants nor anyone else could infer anything more from the transactions than that they were a method of financing DeAngelis' inventory until it was needed.

A. All Ex-Pit Transactions By Bunge Were Legal.

Rule 6 of the Cottonseed Oil Futures Contracts Rules of the New York Produce Exchange in effect during 1963 provides:

> "All orders for the purchase or sale for future delivery of any commodity dealt in on this Exchange, in

order to be incorporated in and recorded upon the recording mechanism of the Exchange, must be (unless specifically excepted in paragraphs (a) and (b) hereof) executed in good faith by an actual bona fide transaction entered into at public outcry at the trading ring provided for that purpose on the Exchange Floor and at a price against which all members present at the trading ring shall have had an opportunity to bid or offer, and during such hours as shall have been designated for trading in such commodity.

EX-RING TRADES

Exceptions:

(a) Transfers of open contracts involving no change in ownership.

(b) Trades made *in connection with cash fats, oils and oil seeds transactions or* exchanges of futures contracts for cash fats, oils and oil seeds.

All such transactions shall be reported and recorded during market hours on the day the transactions are to be cleared. Any such transaction entered into after the close of the market shall be reported, recorded and cleared on the following business day." (Emphasis added.)

The gravamen of the plaintiff's case at trial was premised upon his interpretation of paragraph (b). It was plaintiff's contention that the only legitimate Rule 6(b) ex-pit transaction is an exchange of futures for cash oil,* *i.e.*, one in which X, who owns a contract amount (namely 60,000 pounds) of cash oil, sells that oil to Y, who is short one futures contract, and in exchange receives from Y that short futures contract. In so interpreting the rule, plaintiff ignores the fact that Rule 6(b) is stated in the disjunctive,

* The term "cash oil" means the physical commodity.

and includes not only exchanges of futures for cash oil, but also trades made "in connection with cash fats, oils and oil seeds transactions." The challenged transactions were ones in which, for example, DeAngelis owned a contract amount of cash oil and sold that oil (represented by a registered warehouse receipt) to Bunge Corporation. Simultaneously, in order to hedge its position, Bunge agreed to go short one futures contract and DeAngelis, having sold the oil but presumably having a need for it again some time in the future, agreed to go long one futures contract. (Fornari, JA 1319a-1322a; DeAngelis, JA 1065a-1066a.) Thus, the transaction had the effect of creating new futures positions for both parties to it. After the transaction was effectuated, Bunge owned one contract amount of cash oil and was short one futures contract; DeAngelis was long one futures contract.

Plaintiff's basic misunderstanding of these transactions and the proper construction of Rule 6(b) is best illustrated by the testimony of his expert witness, Reynold P. Dahl. Professor Dahl testified that these transactions were not authorized under the rules and that their effect was to *decrease* the open interest. This *decreasing* effect, he said, was significant because when a large number of trades which should have the effect of *decreasing* the open interest occur simultaneously with an increase in the open interest, that pattern becomes a warning sign. (Dahl, JA 341a-342a, 353a-356a.) However, on further cross-examination, Dahl admitted that the effect of the particular ex-pit transactions which plaintiff challenges was actually to *increase* the open interest. (Dahl, JA 358a.) Dahl also testified that the source of his confusion was the fact that the ex-pit rule of the Produce Exchange (which was sanctioned by the CEA) was broader than the rule on the exchange on which he was a member and with which he was familiar. (Dahl, JA 356a-357a, 360a-361a.) Dahl also admitted that he was unable to state that any of these transactions was unjustified. (Dahl, JA 359a-360a.) He was compelled to reach

that conclusion because these transactions were proper in all respects.

Plaintiff's view of the ex-pit transactions is also contradicted by the testimony of two of his principal witnesses, DeAngelis and Gerald Gittleman, DeAngelis' chief cottonseed oil trader. Both DeAngelis and Gittleman stated that these transactions were regarded by them as entirely proper and were reported to the Produce Exchange. (DeAngelis, JA 1105a; Gittleman, JA 1164a-1167a.) DeAngelis also testified that these transactions were purchases and sales. (DeAngelis, JA 1105a-1108a.) Finally, DeAngelis regarded the terms of the ex-pit transactions as fair and beneficial to Allied and thought that the profits from those transactions were nominal. (DeAngelis, JA 1072a-1077a, 1106a-1111a.)

Even more significantly, the ex-pit transactions were known to the Exchange and the Commodity Exchange Authority and were considered proper by them. The president of the Exchange, Mr. MacDonald, and the treasurer, Mr. Fashena, both testified that these transactions were known to the officials of the Exchange and that they were legitimate. (MacDonald, JA 645a-646a; Fashena, JA 920a.) The record also demonstrates that Mr. Reed McMinn, the New York representative of the CEA, and his superiors at the CEA in Washington were aware of this type of ex-pit transaction which had the effect of creating new positions for both parties to the transaction; and were aware that Allied used offsetting ex-pits as a vehicle to move forward a long futures position from a near month to a more distant month; and that these transactions were being utilized by Allied for financing purposes. McMinn testified that he had discussed the method by which such transactions were effected with Berg early in 1963. (McMinn, JA 877a-878a, 886a-890a.) These discussions are reflected in the memoranda contained in PX 41, JA 159e-169e. Thus, the Commodity Exchange Authority was fully apprised of these transactions and did not challenge their legitimacy. (MacDonald, JA 646a.)

B. Professor Gray's Theory With Respect To Ex-Pits Was Implausible.

Plaintiff relied almost entirely upon the testimony of Professor Roger Gray to attempt to establish the impropriety of the ex-pit transactions. Professor Gray posited the proposition that the ex-pit transactions were manipulative and were used by DeAngelis to keep oil off the market. (Gray, JA 1642a, 1647a-1648a, 1652a.)* However, the testimony elicited from him on cross-examination establishes that the transactions could not possibly have had the manipulative purpose that he claims they did. The reasons for that conclusion are as follows:

1. Gray conceded that in one of the six transactions in which Bunge was involved, Bunge held the warehouse receipts for only four days (PX 260D). (Gray, JA 1774a.) In another transaction, the receipts were held by Bunge for only nine days (PX 260E). (Gray, JA 1774a.) In a third transaction, all but eighty-six of the 696 receipts were held by Bunge for less than ten days (PX 260A). And, finally, Gray conceded that the average period of time the warehouse receipts purchased by Bunge were held was twenty-one days. (Gray, JA 1774a.) These facts do not support the conclusion that DeAngelis was utilizing these transactions to stabilize the market. The only rational conclusion

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* In spite of this view, Gray testified that during the period of some of these transactions, the price of the futures market went up, and during the period of other transactions, the market went down. (Gray, JA 1772a-1773a.) With no better price analysis than that, it is impossible to conclude that there was any manipulation accomplished by means of these transactions. In all plaintiff's exhibits, there is none which shows prices throughout 1963 and, significantly, none of his expert witnesses made a study of cottonseed oil futures prices.

Furthermore, Professor Gray stated that it made no difference whether or not the futures involved in these transactions were traded in the pit or ex-pit (Gray, JA 1717a-1718a) which seems inconsistent with his theory that DeAngelis' purpose in these transactions was to keep oil off the market.

is that DeAngelis had some other purpose for entering into these transactions, such as holding inventory for expected future sales. Indeed, the fact that DeAngelis bought back the registered warehouse receipts weeks and even months before they were to be tendered on the Exchange not only fails to suggest that his purpose was to hold them off the market but is convincing evidence that that was not his purpose.

2. In several of the transactions (PX 260A, 260C and 260F), DeAngelis repurchased the cash oil, represented by registered warehouse receipts, at different times (six different times in the case of PX 260C and five different times in the case of PX 260A). (Gray, JA 1770a-1773a.) This would certainly lead a reasonable businessman to conclude that DeAngelis was calling for inventory as the need arose and not trying to keep the receipts off the market for the longest possible time.

3. Gray appeared to put great weight on his view that these transactions did not constitute purchases and sales. (Gray, JA 1656a.) Whether the transactions were purchases or sales is a question of law. The law is that a warehouse receipt which by its terms makes the goods deliverable to bearer or to the order of a named person is a negotiable document of title. UCC § 7-104(1)(a). The registered warehouse receipts involved in these transactions were negotiable (*e.g.* PX 238, JA 677e-685e) and the negotiation of those receipts transferred title and ownership both to the receipts and to the goods covered thereby. UCC § 7-502. Additionally, it is obvious that the "riskless" nature of these transactions depended upon Bunge's ability to tender the registered warehouse receipts to the Clearing Association against Bunge's offsetting futures contracts and to do this Bunge had to be the owner, as even DeAngelis conceded it was. (DeAngelis, JA 1106a-1108a.)

* * *

Even assuming that it could somehow have been deduced from these facts that DeAngelis' purpose in these transactions was to hold oil off the market for long periods of time, there is no evidence in the record to suggest that Klein could have surmised that that was the purpose of these transactions, or that he knew anything about the details of the transactions. To the contrary, Klein testified that all he knew about the transactions was that Bunge was fully hedged. (Klein, JA 1384a.)

CONCLUSION

Plaintiff had more than a fair chance to present and argue his case to the jury in the nearly seven weeks of trial. The Trial Judge acted fairly and impartially. His rulings were correct and were directed toward making a complex case as comprehensible for the jury as possible. Under these circumstances, a lengthy trial before another jury is not required to close this long chapter of litigation nearly 13 years after the events that gave rise to it.

Respectfully submitted,

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APPENDIX

(Opinion of the Trial Court Excluding Evidence of the Harbor Tank Incident, JA 1010a-1013a.)

The Court:

I have made up my mind in regard to the pending motion and I might as well announce it now rather than waiting. The motion is granted. And I am granting it, that is, the motion to bar the introduction of any evidence in respect to the Harbor Tank incident in this trial, is granted. I am basing it on two grounds and I will set that out so you will know why I am doing it.

As I understand the New Jersey action brought by the plaintiff, and as I read the papers, that in that action they asserted as to Klein a failure to discharge his statutory duty as a member of the Board of Managers of the New York Produce Exchange to disclose the facts he knew about Allied and DeAngelis in respect to the Harbor Tank matter, and they also asserted a failure to discharge Klein's duty to the New York Produce Exchange, so that the latter could discharge its duty in the regulation of the market.

That action was settled and a release was granted [by] the plaintiff, to Bunge, and to Klein. Plaintiff now says that despite that release and settlement, that it can insert the Harbor Tank incident into this action, and their theory is that a single set of facts can properly give rise to several causes of action.

In granting that, I don't believe that the situation fits into that category. And since Mr. Klein's duty in re Harbor Tank as a member of the Board of Managers was specifically brought in issue in the New Jersey action and it is that duty which is being litigated here, to allow the Harbor Tank incident to be reintroduced into this trial would seem to me to be allowing the relitigation.

I must confess that perhaps a more careful framing of the issues in New Jersey might have led to the results which plaintiff asserts here. But as I read the issues and as they are presented, they do not conform to the restricted reading that plaintiff asserts. Even if I were disposed to allow it and concede at that time plaintiff was correct on that first ground, I would bar it under any circumstances [because] I think that it would be prejudicial, it would lead to confusion, and would probably prolong the trial.

It would cause, it seems to me, a trial within a trial; it would make the Court's task of keeping the trial focused on the basic issues, which is as I think you all understand, in a multi-party trial, is difficult at best, in my judgment it would make a task impossible.

I also think that the fallout in respect of Continental Grain, Vogel, Anderson and Merrill Lynch would be particularly prejudicial because they would be engulfed in a great deal of evidence which has no relationship to their liability at all, and on the other hand I think that it would be particularly prejudicial to the New York Produce Exchange because it would taint them with alleged misdeeds about which at least insofar as the New Jersey action asserts, about which they knew nothing.

And finally, I am persuaded that there is sufficient indicia of Allied's and DeAngelis' bad reputation and involvement in unsavory matters to allow the plaintiff to introduce evidence to go to the question of foreseeability and the failure of the Board of Managers to perform their function, that they can do that without bogging the trial down of this motion.

So the motion is granted. The proffer this morning of what the evidence is is sufficiently set out on the record, and I think that therefore the record is protected.

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Date 8/5/76 12:00 noon